

CHIM YIAM & ASSOCIATES v. M MOHAN GHANDI & ANOR**A**

HIGH COURT MALAYA, KUALA LUMPUR

SM KOMATHY JC

[ORIGINATING SUMMONS NO: 24NCVC-796-06-2014]

5 AUGUST 2014

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TORT: *Abuse of process – Essential elements – Filing of defence and counterclaim – False allegations raised in pleadings – Predominant purpose of filing – Whether defendants vexatious litigants – Whether present action can be maintained against defendants based on defence and counterclaim filed in earlier actions – Whether application to be made in same action – Whether defendants only defended themselves without initiating any actions against plaintiff*

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CIVIL PROCEDURE: *Abuse of process – Filing of defence and counterclaim – False allegations raised in pleadings – Application for tort of abuse of process – Whether present action can be maintained against defendants based on defence and counterclaim filed in earlier action – Whether application to be made in same action – Whether defendants only defended themselves without initiating any actions against plaintiff – Whether defendants vexatious litigants*

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The plaintiff was a firm of advocates and solicitors and their services were initially engaged by the second defendant. Upon receipt of the plaintiff's bill for their legal fees, the second defendant requested the plaintiff to tax their bill as they were unaware of any legal fee agreement between them. The second defendant engaged the services of the first defendant, an advocate and solicitor, to obtain a taxation order. The court made an order for the plaintiff's bill to be taxed. The plaintiff, however, did not initiate any taxation proceedings. Instead, the plaintiff filed an originating summons in the Shah Alam Sessions Court to claim for the outstanding legal fees. However, the action was dismissed for want of jurisdiction. Thereafter, the plaintiff filed an originating summons in the Shah Alam High Court ('Shah Alam suit') and claimed for the outstanding legal fees. As a result of the second defendant's application, the High Court converted the originating summons into a writ action. In its defence, the second defendant alleged fraud and forgery against the plaintiff. The plaintiff's application to strike out the defence was struck out and the plaintiff was ordered to pay costs. However, on 23 June 2014, the Shah Alam suit was struck off due to the plaintiff's failure to comply with certain case management directions. *Vide* this action, the plaintiff alleged that the defendants had abused the court process by filing a false defence and counterclaim in the Shah Alam suit. Further, it was argued that these false allegations had ruined the plaintiff's professional reputation and legal practice. On this basis, the plaintiff applied for a declaration that the defendants were vexatious litigants. The defendants opposed this application and argued, *inter alia*, that (i) the plaintiff's remedy would have been to make the necessary application in the Shah Alam suit to strike out the same; (ii) the present application was filed when the Shah

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- A Alam suit was still subsisting; and (iii) there was no factual basis for the assertion that the defendants were vexatious litigants as they did not initiate the numerous actions. The issue that arose for consideration was whether an action for tort of abuse of process can be maintained against a defendant and his solicitor based on a statement of defence and counterclaim filed by them in an earlier action.
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Held (dismissing plaintiff's application with costs):

- (1) The tort of abuse of process is committed when a person conducts litigation for a purpose other than that for which the court's process is designed. In other words, the process must have been instituted for an ulterior purpose. It is concerned not with the merits of the claim but with the purpose for which the proceedings were brought. The essence of the tort is the use of legal process to gain an end which the legal process does not entitle the plaintiff to obtain. Therefore, to amount to an abuse of process, the plaintiff must show that he is a party to a legal process initiated by the defendant and the commencement or maintenance of the proceeding must be for a collateral purpose and not the purpose as indicated in the statement of claim. (para 17)
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- (2) The Shah Alam suit and the earlier actions were not commenced by the defendants. All these actions had been instituted by the plaintiff against the defendants. The defendants only had to defend themselves in these actions. Further, the plaintiff failed to prove that the defendants' predominant purpose in filing the defence and counterclaim was to hurt the plaintiff. (paras 18 & 23)
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- (3) A litigant who wishes to raise a plea of abuse of process must make the application in the same action. On the facts, the plaintiff was not entitled to rely on the pleadings filed by the defendants to mount their cause of action based on the tort of abuse of process. An action for the tort of abuse can only be founded on legal proceedings initiated by the defendants. The counterclaim filed by the defendants in the Shah Alam suit was not based on an independent cause of action but was intimately linked to their defence. As such, it could not be regarded as a legal action initiated by the defendants against the plaintiff. The plaintiff's remedy to the allegation of abuse of process would have been an application under O. 18 r. 19 of the Rules of Court 2012 to strike out the defence and counterclaim. (paras 21 & 22)
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- (4) A litigant is not without remedy when there is an abuse of the court process in litigation. He can invoke the procedural defence of abuse of process which gives him the right to raise the issue in his statement of defence and seek the court's protection against such abuse when there is a factual basis to support the claim. However, on the facts, there was no factual or legal basis on which the claim as formulated could be advanced and sustained. (paras 25 & 26)
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Case(s) referred to:

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC (*fol*)
Grainger v. Hill (1838) 4 Bing NC 212, 7 LJCP 85, 1 Arn 42 (*refd*)
Harris v. GlaxoSmithKline Inc [2010] 78 CCLT (3d) 52 (*refd*)
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed
[1998] 2 CLJ 340 CA (*refd*)
Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 (*fol*)

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007,
s. 4
Rules of Court 2012, O. 18 r. 19

For the plaintiff - Wong Chim Yiam; M/s Chim Yiam, Lee, Tan & Assocs
For the 1st defendant - Mohan Ghandi; M/s Mohan Ghandi & Assocs
For the 2nd defendant - David Peter; M/s Jerald Gomez & Assocs

Reported by Kumitha Abd Majid

JUDGMENT**SM Komathy JC:**

[1] The issue that arises for determination in this case is whether an action for tort of abuse of process can be maintained against a defendant and his solicitor on the basis of a statement of defence and counterclaim filed by them in an earlier action.

[2] On 2 June 2014, the plaintiff, a firm of advocates and solicitors, instituted the present originating summons in the Kuala Lumpur High Court against the first defendant Mohan Gandhi, an advocate and solicitor and his client, alleging that they had abused the court process by filing a false defence and counterclaim in the Shah Alam High Court against them. On this basis, the plaintiff applied for a declaration that the defendants are vexatious litigants and a further order that they pay their legal fees of RM203,991.45, which formed the subject matter of the Shah Alam High Court.

Background Facts

[3] The second defendant is a joint management body ("JMB") established under s. 4 of the Building and Common Property (Maintenance and Management) Act 2007 ("Act 663"). The second defendant had earlier engaged the services of the plaintiff for which the plaintiffs had rendered a bill for legal fees of RM77,412.45 based on a legal fee agreement dated 12 October 2010. The second defendant asked that the plaintiff to tax their bill as they were unaware of any legal fee agreement between the erstwhile JMB and the plaintiff.

- A [4] The second defendant then engaged the services of the first defendant to obtain a taxation order. A petition was filed on 20 December 2012 to obtain a taxation order and on 2 December 2013, the court made an order for the plaintiff's bill to be taxed. However, no taxation proceedings were initiated by the plaintiff. Instead, the plaintiff filed an originating summons in the Shah Alam Sessions Court claiming a sum of RM203,991.45 as outstanding legal fees which sum included the sum of RM77,412.45. On the second defendant's application, the sessions court dismissed the action for want of jurisdiction on the ground that an originating summons can only be filed in the sessions court.
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- C [5] The plaintiff then filed an originating summons in the Shah Alam High Court (hereinafter referred to as the "Shah Alam suit") claiming the sum of RM203,991.45. On the second defendant's application, the High Court converted the originating summons into a writ action. In its defence, the second defendant alleged fraud and forgery. It is this pleading that forms the foundation for the present originating summons. The plaintiff then moved the court to strike out the second defendant's defence on ground that it was an "abuse of legal process" and an attempt to "re-litigate" issues of fact. The said application was struck out and the plaintiff were ordered to pay RM3,000 costs.
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- E [6] The plaintiff then filed the present originating summons seeking orders which if granted would effectively preclude the second defendant from defending itself in the Shah Alam suit.
- [7] On 23 June 2014, the Shah Alam suit was struck off with costs of RM2,000 on account of the plaintiff failure to comply with certain case management directions.
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Relief Sought In Originating Summons

[8] The grounds for the plaintiff's application is stated in the originating summon which is reproduced below:

- G Based upon construction arising out of the statement of defence and (counter claim) dated 14 June 2013 yang difailkan defendan-defendan ke dalam Mahkamah Tinggi Shah Alam guaman no. 22NCVC-399-05/2013, eksibit "WCY1 ..."
- and further down,
- H Merujuk kepada pliding kes Mahkamah Tinggi Shah Alam Guaman No.: 22NCVC-399-05/2013, eksibit "WCY1 ...", plaintif menyatakan bahawa plaintif memohon "declaratory relief" dan "enforcement of legal fee agreement" menurut Aturan 15 Kaedah 16 Kaedah Mahkamah 2012 dan seksyen 116 dan 118 Akta Profession Undang 1976.
- I ...
- defendan-defendan "knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* prosecuted" plaintif

- dengan kesalahan jenayah apabila mendakwa Legal Fee Agreement tersebut diperolehi secara “fraud, forgery” dan tandatangan, chop, stamping kesemuanya mencurigakan. **A**
- defendan-defendan “knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* relitigated Legal Fee Agreements apabila mendakwa amaun yuran guaman tidak munasabah dan kononnya defendan tidak puas hati dengan perkhidmatan plaintiff.” **B**
- defendan-defendan “knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* mendakwa, menghukum dan menyabit plaintiff apabila mendakwa plaintiff cuai dan melanggar kontrak. Dan seterusnya “counterclaim” terhadap plaintiff.” **C**
- (a) Merujuk kepada pliding kes Mahkamah Tinggi Shah Alam Guaman No: 22NCVC-399-05/2013 ekshibit “WCY-1”, plaintiff menyatakan bahawa plaintiff memohon “declaratory relief” dan “enforcement of legal fee agreement” menurut Aturan 15 Kaedah 16 Mahkamah 2012 dan seksyen 116 dan 118 Akta Profession Undang 1976. **D**
- (b) Manakala merujuk kepada pernyataan pembelaan defendan-defendan, defendan-defendan telahpun “misconducted” apabila memperlakukan “vexatious litigations and abuse of process” demi untuk mencederakan plaintiff. **E**
- (i) defendan-defendan “knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* prosecuted” plaintiff dengan kesalahan jenayah apabila mendakwa Legal Fee Agreement tersebut diperolehi secara “fraud, forgery” dan tandatangan, chop, stamping kesemuanya mencurigakan. **F**
- (ii) defendan-defendan “knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* relitigated Legal Fee Agreements apabila mendakwa amaun yuran guaman tidak munasabah dan kononnya defendan tidak puas hati dengan perkhidmatan plaintiff. **G**
- (iii) defendan-defendan “knowingly and/or in reckless disregard whereby in reliance upon Legal Fee Agreement litigation services have been rendered by the plaintiff to the defendant, *mala fide* mendakwa, menghukum dan menyabit plaintiff apabila mendakwa plaintiff cuai dan melanggar kontrak. Dan seterusnya “counterclaim” terhadap plaintiff. **H**
- (c) Plaintiff menyatakan bahawa plaintiff mempunyai “legal interest” untuk mendapatkan “binding declarations of right”. Ini adalah kerana “vexatious litigations and abuse of process” yang tersebut diatas telahpun mengakibatkan kerugian dan kerosakan kepada plaintiff. **I**

A [9] The plaintiff sought the following reliefs which also merit reproduction in full:

- B** (d) Suatu perintah “defendant by himself, his servants, agents, Solicitors be restrained from executing, enforcing and/or prosecuting any Judgement/Order/Decree connected to or relevant to the proceedings in Shah Alam High Court Civil Suit No: 22 NCVC-399-05/2013.”
- C** (e) Suatu perintah dimana defendan-defendan diisytiharkan “vexatious litigants” menurut section 25(2) and schedule Court’s of Judicature Act 1964” dan defendan-defendan dihalang membawa kes-kes baru terhadap plaintiff tanpa kebenaran Mahkamah.
- D** (f) “consequential relief” bahawa defendan-defendan (jointly and severally) menggantirugikan serta membayar yuran guaman yang dipersetujui sebanyak RM203,991.45.
- (g) “consequential relief” bahawa setiap dan tiap-tiap defendan-defendan secara berasingan membayar “damages for injuries to professional livelihood, reputation, injuries to credit and wounded feelings” (ditafsirkan) kerana melakukan banyak “vexatious litigations and abuse of process” sepertimana yang tercatat didalam perenggan b(i) sehingga (iii) diatas.
- E** (h) Faedah pada kadar 8%.
- (i) Kos atas dasar klien dan peguam kerana “abuse of process” melibatkan Public Policy.
- (j) Perintah bahawa defendan-defendan membayar gantirugi-gantirugi yang ditaksirkan dengan faedah daripada tarikh 31.5.2013 sehingga tarikh penyelesaian sepenuhnya, kos tindakan ini dan juga kos taksiran gantirugi oleh Timbalan Pendaftar.
- F** (k) Perintah atau lain-lain relief yang difikirkan adil dan sesuai oleh Mahkamah yang Mulia.

The Arguments

G [10] The plaintiff contended that the predominant factor which had led the defendants to allege fraud and forgery against them in the pleading was to destroy them professionally and financially. These false allegations have ruined their professional reputation and legal practice. There has been a blatant misuse of the court’s process by the deliberate and intentional filing of a false defence and counterclaim. In support of their submission, that the conduct of the defendants was an actionable tort, the plaintiff relied on the judgment of the Court of Appeal in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425.

I [11] The defendants opposed the application on several grounds. Their submissions can be summarised as follows:

- (a) The plaintiff's claim was predicated on the defence and counterclaim filed in the Shah Alam suit. As that suit has been struck off, the substratum of the present claim is no more and the claim automatically falls. A
- (b) If indeed there was any basis for the plaintiff complaints about the defence and counterclaim, the plaintiff remedy is to make the necessary application in the Shah Alam suit to strike out the same. B
- (c) The present originating summons was filed when the Shah Alam suit was still subsisting. The relief sought in both proceedings is the same and amounts to duplicity. C
- (d) There is no evidence that they are vexatious litigants as alleged. There was no factual basis for this assertion as the defendants were not the ones who initiated the numerous actions.

Analysis

[12] Turning first to the contents of the originating summons. The defendants complained that the contents of the originating summons were confusing, difficult to decode and unintelligible. I cannot disagree. It is indeed a piece of highly confusing and a rambling pleading which was bilingual ie partly in English and partly in Malay language. Many sentences start in one language and drift into another language and result in being gibberish. D E

[13] The tort of abuse of process of the court was first formulated in *Grainger v. Hill* (1838) 4 Bing NC 212, 7 LJCP 85, 1 Arn 42. In that case the plaintiff was the master and owner of a ship. He had borrowed £80 from the defendants on the mortgage of a ship which he owned. The debt was repayable on 28 September 1837. The defendants, being apparently apprehensive as to their security, decided in November 1836 (ie before the debt was repayable) to possess themselves of the ship's register without which the plaintiff could not go to sea. They therefore called on the plaintiff to pay the debt which was not due yet. They threatened to arrest him if he failed to pay. The defendants then made an affidavit of debt and sent in two sheriff's officers with the writ to the plaintiff, who was ill in bed and attended by a surgeon. One of the officers then informed the plaintiff that they had not come to take him, but to obtain the ship's register; but that if he failed to deliver the register, either they must take him or leave one of the officers with him. The plaintiff panicked when he was unable to procure bail and being alarmed, gave up the register. F G H

[14] The plaintiff then instituted an action against the defendant claiming damages for the loss of voyages which he could not undertake because of the loss of the register, and also the recovery of the register. The plaintiff succeeded at the trial, and there was an appeal to the exchequer chamber, which dismissed it. Tindal CJ said, at p. 221: I

- A** The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the Defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the Defendants' proceeding, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved.
- B**

... the abuse, as I understand it, was that the purpose of the original proceeding was not the recovery of the debt (which was not due) but the extortion of the register ...

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[15] I turn now to the judgment of the Court of Appeal in *Malaysia Building Society Bhd (supra)* relied on by the plaintiff in support of their case. Gopal Sri Ram JCA, after reviewing decisions from other jurisdictions including *Grainger v. Hill* came to the conclusion that this tort is applicable in Malaysia. In addressing the modern scope of this tort, His Lordship explained (at 434):

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Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

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The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p. 489 he said:

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In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Later, he added (at 438):

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In my judgment, the essential elements of the tort of abuse of process are these:

- (1) The process complained of must have been initiated; A
- (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and B
- (3) The plaintiff must have suffered some damage or injury in consequence.

It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour. C

[16] The Ontario Court of Appeal in *Harris v. GlaxoSmithKline Inc* [2010] 78 CCLT (3d) 52, stated at para. 27: D

The case law authorities establish that there are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted: E

[17] It is clear from the foregoing passages that the tort of abuse of process is committed when a person conducts litigation for a purpose other than that for which the court's process is designed or in other words, the process must have been instituted proceedings for an ulterior purpose. Abuse of process involves a misuse of the court's process. It is concerned not with the merits of the claim but with the purpose for which the proceedings are brought. The essence of the tort is the use of legal process to gain an end which the legal process does not entitle the plaintiff to obtain. Therefore to amount to an abuse of process, the plaintiff must show that he is a party to a legal process initiated by the defendant and the commencement or maintenance of the proceeding must be for a collateral purpose and not the purpose indicated in the statement of claim. F

[18] The factor which in my judgment breaks down the plaintiff's argument of misconduct and abuse of process is the fact that the Shah Alam suit and the earlier actions were not commenced by the defendants. On the contrary, all these actions had been instituted by the plaintiff against the defendants. The defendants only had to defend themselves in these actions against the claims initiated by the plaintiff. G

[19] The English Court of Appeal in *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14, [1989] 3 WLR 563 addressed the question of whether adducing false evidence and H

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- A** presenting a false case to sustain or defeat a claim in legal proceedings amounted to the tort of abuse of process. It was held that such conduct did not amount to the tort of abuse of process. Slade LJ, who delivered the judgment of the Court of Appeal, observed at p. 469:
- B** The substance of the complaint against the defendants is that they abused the process of the court by adducing false evidence and submitting a false case for the primary purpose of defeating claims by M & R in the proceedings to the return of their metal and other assets and to prevent the defendants from dealing with such assets in the mean time.
- C** No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way of a penal order for costs or even a prosecution for perjury. *In our judgment, however, it does not expose him to an action for damages in tort under the principle of Grainger v. Hill.*
- D** No authority has been cited to us which satisfies us that it does. If the use of court process is to expose a party to liability under this principle, the process must, in our judgment, have been used for a predominant purpose ‘outside the ambit of the legal claim upon which the Court is asked to adjudicate’ (cf *Varawa v. Howard Smith Co* (1911) 13 CLR 35 at 91 per Isaacs J). *Relief in tort under the principle of Grainger v. Hill is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in civil proceedings.* This may well cause hardship to an injured party who cannot be sufficiently compensated by an appropriate order for costs.
- E**
- F** However, if there is a gap in the law it rests on sound considerations of public policy, as does the rule of law which gives immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. If the position were otherwise, honest litigants might be deterred from pursuing honest claims or defences and honest witnesses might be deterred from giving evidence.
- G** And at p. 50;
- We also have great doubt whether, in a case such as the present, the defendants could fairly be regarded as having instituted proceedings or set the law in motion, as would presumably be necessary for this tort if it does exist. There might, we accept, be cases in which a defendant launched a counterclaim independent of the plaintiff's claim against him and truly to be understood as a cross-action. Then the counterclaiming defendant could perhaps be treated as a plaintiff. It seems to us, however, that in the first action AML's counterclaim was intimately linked with their defence and arose from the issues raised by M & R in their points of claim. Gatehouse J did not deal in detail with AML's counterclaim because he had already substantially rejected it in upholding M & R's claim.
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- (emphasis added)

[20] In *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259, the court dismissed an action brought by a developer against several defendants on the ground that it did not disclose a cause of action and was an abuse of the court process. The developer had initiated this action as a result of the defendants having taken out an originating motion against it and others to quash the approval given to the developer for a development project in Bukit Gasing. In dismissing the action, Mahadev Shankar J criticised the developer for having initiated a separate action to declare the originating motion filed by the defendants was an abuse of process of court. He stated:

A litigant who is a party to civil proceedings who claims that those proceedings under an abuse of process must take objection in that very proceedings under Order 18 Rule 19(1)(d). The filing of collateral action as was done in this case was itself an abuse of process which must result as happened here being struck out

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In the light of my other findings, I do not think it is necessary for me to go into the developer's motives for filing this action. Suffice to say in conclusion that I hope the award for costs against the developer in this case and a proper understanding of the law should persuade future litigants who wish to take up a plea of abuse of process that it would be in their best interests to avail themselves of the salutary provisions of O 18 r 19(1) of the RHC.

[21] These authorities illustrate that the filing of a false pleading and the adduction of false evidence to sustain a defence is not an actionable tort. Further, the filing of a counterclaim which is related to the defence, cannot be regarded as a "legal process initiated by the defendant". It is only a counterclaim which is unrelated to the claim that may satisfy the first requirement of this tort. Further, a litigant who wishes to raise a plea of abuse of process must make the application in the same action.

[22] Applying these principles to the present case, it is clear that the plaintiff are not entitled to rely on the pleadings filed by the defendants to mount their cause of action based on tort of abuse of process. An action for the tort of abuse can only be founded on legal proceedings initiated by the defendants. The counterclaim filed by the defendants in the Shah Alam suit was not based on an independent cause of action but was intimately linked to their defence. As such, it cannot be regarded as a legal action "initiated" by the defendants against the plaintiff. The plaintiff's remedy to the allegation of abuse of process would have been an application under O. 18 r. 19 Rules of Court 2012 to strike out the defence and counterclaim.

[23] Even if I am wrong in my conclusion that the defendants have not satisfied the first requirement. In my judgment, the plaintiff have also failed to prove that the defendants predominant purpose in filing the defence and counterclaim was to hurt the plaintiff.

A Conclusion

[24] The authorities on this area of the law establish that a litigant commits tort of abuse of process by filing and pursuing an action not for the predominant purpose indicated in the statement of claim in that action but with an ulterior motive or for a collateral purpose of injuring the defendant or interfering with his rights. The bringing of a legal action, even if it is factually groundless and motivated by ulterior motives is not sufficient to constitute the tort of abuse of process. Our system of litigation operates on the basis that the law permits every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings.

[25] A litigant is, however, not without remedy when there is an abuse of the court process in litigation. He can invoke the procedural defence of abuse of process which gives him the right to raise the issue in his statement of defence and seek the court's protection against such an abuse when there is a factual basis to support the claim.

[26] In the present instance, there is no factual or legal basis on which the claim as formulated can be advanced and sustained. The plaintiffs' application is therefore dismissed with costs of RM10,000 to each defendant.

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